Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.,	)	
Consolidated Application for Authority to	)	
Provide In-Region, InterLATA Services in	)	WC Docket No. 02-148
Colorado, Idaho, Iowa, Nebraska and North	)	
Dakota	)	
	)	

SUPPLEMENTAL COMMENTS OF AT&T CORP.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4263

David L. Lawson
Mark Schneider
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

Attorneys for AT&T Corp.

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TABLE OF CONTENTS

FCC ORDERS CITED

SHORT CITE	FULL CITE
BellSouth Louisiana II Order	Memorandum Opinion and Order, *Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998)
Georgia/Louisiana 271 Order	Memorandum Opinion and Order, *Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35 (rel. May 15, 2002)
Michigan 271 Order	Memorandum Opinion And Order, *Application Of Ameritech Michigan Pursuant To Section 271 Of The Communications Act Of 1934, As Amended, To Provide In-Region, InterLATA Services In Michigan,* 12 FCC Rcd. 20543 (1997)
New Jersey 271 Order	Memorandum Opinion and Order, *Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in New Jersey*,WC Docket No. 02-67 (rel. June 24, 2002)
NY 271 Order	Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953 (1999)
Pennsylvania 271 Order	Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419 (2001)
Texas 271 Order	Memorandum Opinion and Order, *Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000)

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SUPPLEMENTAL COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these supplemental comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota.

INTRODUCTION AND SUMMARY

That this case still moves forward is beyond belief. Seventy days into the 90-day schedule allotted for a section 271 proceeding, Qwest, the applicant, has effectively conceded that that the entire Application was corrupted from the outset. Beginning years ago, continuing through the filing of Qwest's Application with the Commission, and persisting throughout the comment period, Qwest has deliberately engaged in a widespread, pervasive and secret course of discrimination among CLECs in violation of the first two nondiscrimination requirements in the competitive checklist. Qwest engaged in this discrimination not merely to gain commercial advantage, but to buy the silence of CLECs that might otherwise contradict the testimony that Qwest has relied on in this proceeding and the state proceedings below. This discrimination is all the more eggregious because Qwest has also just informed the Commission (and the

Securities and Exchange Commission) that, contrary to assertions in the Section 272 declarations Qwest filed with its Appilcation, Qwest *cannot* certify that the books of its long distance affiliate comply with GAAP accounting principles. That alone precludes the Commission from finding that Qwest qualifies for interLATA authority. *See* 47 U.S.C. § 272(b)(2).

The Commission does not need any further rounds of comments to decide how to respond. It is obvious that the only lawful course for the Commission is to deny the Application. The indisputable evidence of Qwest's longstanding, ongoing, secret and discriminatory deals with CLECs foreclose any possible finding by this Commission that Qwest provides nondiscriminatory interconnection and access to unbundled network elements ("UNEs"). Although only a subset of Qwest's secret deals have yet come to light, the limited and grudging disclosures made by Qwest to date reveal indisputably that Qwest has engaged in widespread and illegal discrimination in the rates, terms and conditions upon which it provides access to interconnection and network elements.

Qwest's misconduct, moreover, fatally compromised the results of the independent third-party testing of Qwest's wholesale provisioning systems – as the independent third party itself has recognized. Qwest's corrupt deals likewise have tainted the entire record on which Qwest relies in this case, because the deals procured the silence of CLECs which had previously charged Qwest with misconduct and violations of the Act, along with other CLECs that were uniquely positioned to identify how Qwest was continuing to impede competition. And it is equally clear that the Commission cannot possibly make the public interest findings required to grant Qwest's application. Until Qwest cleans house and refiles its application based on a new, untainted evidentiary record upon which it can prove compliance with the nondiscrimination and

public interest requirements, Qwest is unfit to provide long distance service in any of the states at issue.

Qwest's eleventh hour attempt to paper over its misconduct by submitting new, post-comment information on August 20 is yet a further assault on the integrity of the Commission's processes. The Commission's rules and established precedents provide no possible basis for waiving the complete-as-filed rule, and any such waiver would run headlong into a host of consistent Commission decisions that no such waiver can granted where, as here: (1) the late-filed information was available and clearly at issue long before the application was filed, and there have been no changed circumstances that could justify the delay in submitting the information; (2) the late-filed information raises so many complexities as to preclude meaningful last-minute comment or Commission review; and (3) the late-filed evidence is not an isolated, excusable occurrence, but part of a pattern of repeated late filings and gamesmanship.

Even if Qwest's 11th-hour proposal were properly before the Commission, it is utterly devoid of credibility and could not serve as a basis for the necessary checklist findings. Throughout the proceedings before the state commissions, Qwest has repeatedly stonewalled efforts to uncover its discriminatory conduct, disgorging incriminating documents only grudgingly, on a piecemeal basis, and after state investigators have independently discovered the same documents through third-party information demands. In at least two states, Qwest has denied the existence of oral agreements whose existence was subsequently unearthed by state investigators. With this history, Qwest's mere posting and filing of self-selected agreements, accompanied by a bare assertion that they represent the universe of previously unfiled interconnection agreements, cannot possibly be credited as full disclosure of the universe of Qwest's secret deals. On this record, to accepted Qwest's unsupported claims as a substitute for

actual evidence, subjected to full discovery and examination by other participants and state commissions, would be an abdication of the Commission's responsibilities to enforce the 1996 Act, to base its findings on substantial evidence, to protect the public from competitive misconduct, and to uphold the integrity of the Commission's processes.

In all events, Qwest's belated claims, even if (contrary to all indications) true, would be vastly underinclusive. A careful parsing of Qwest's proposal makes clear that it that it is designed more to conceal than to disclose, for it includes many of the same gambits to which Qwest resorted in its unsuccesful efforts to fool the state commissions. Thus, for example, Qwest states that it is not filing "settlements of past disputes." But as the Arizona staff recently held, Qwest failed to file dozens of interconnection agreements that should have been filed on the grounds that they were mere "billing settlement agreements." Similarly, Qwest seeks to limit its disclosure to agreements that establish ongoing requirements under section 251(b) or (c), a limitation is designed merely to shield sham side deals that, while not purporting to affect section 251 obligations, permit Qwest to provide *de facto* discounts off its interconnection services.

In these circumstances, the Commission cannot credit Qwest's promises that a cure to the hopeless deficiencies in the record is at hand in the waning moments of this proceeding. As September 11 approaches, and the time in which the Commission must approve or reject this Application runs short, it becomes increasingly apparent that the combined efforts of the state commissions and the CLECs to bring these deals to light will only succeed in scratching the surfaces of Qwest's misconduct. Even the limited review AT&T has been able to conduct to date of the agreements that have been produced in other state commission secret deals proceedings confirms that as of this late date, Qwest has *not even listed, much less provided or filed* all of the agreements that meet its own self-serving filing standard. To the contrary, in the

days following the Commission's August 21 Public Notice, AT&T has already identified (and attaches here) more than a half dozen secret interconnection agreements that apply to one or more of the five states at issue in this proceeding, and that Qwest has not posted on its website. This confirms both that it would be patently arbitrary for the Commission simply to take Qwest at its word and that there is no possible way to verify Qwest's bare assertions in the remaining time.

Qwest's August 20th proposal likewise does nothing to remedy the fundamental flaws in the third party OSS testing data upon which Qwest relies (or to address the more general taint caused by the secret deals CLECs brokered nonparticipation). Whatever secret deals Qwest may now belatedly seek to disclose, such disclosure does not alter the fact that the KPMG data upon which Qwest relies to prove OSS parity cannot, by the tester's own admission, be said to reflect Qwest's real-world performance to the typical CLEC. Indeed, recent events in the states have only made the problem clearer. The Arizona proceedings, for example, confirm that there were other secret deal CLECs that KPMG was not even aware of. Here as well there is an obvious and simple solution to the problems Qwest's misconduct has caused: KPMG must be given an opportunity to remove the secret deals data, restate the reported results and offer an opinion that the restated results are representative of real world performance.

Although the secret deals-related problems with this Application alone require rejection, it has many other fatal defects as well, including recently disclosed GAAP accounting discrepancies that are directly relevant to required showings of future section 272 compliance and that raise the specter of claims of failed Commission oversight at a time when the Administration, Congress and other regulators are all working to raise the corporate governance and accounting standards. Qwest and its new management have it within their power

expeditiously to correct all of these problems, but until Qwest does so, its requests for interLATA authority must be denied under a straightforward application of the Act and the Commission's rules.

Qwest has only itself to blame for the hopelessly flawed record that underlies its Application, and upon which this Commission must judge that Application. Indeed, Qwest was fully aware of these flaws *before* it filed that Application, yet it steadfastly resisted the efforts of AT&T and others to correct those errors in state commission proceedings. Thus, Qwest chose not to make the terms of the agreements available to other carriers, despite requests that it do so. And Qwest insisted that the state commission proceedings be closed, despite the requests of AT&T and others to reopen the state section 271 records to allow CLECs that had been precluded from participating by their secret deals to file comments.

I. QWEST'S SECRET DEALS PRECLUDE A FINDING OF COMPLIANCE WITH THE SECTION 271 CHECKLIST.

Based on the record before the Commission in this proceeding, it is indisputable that Qwest cannot demonstrate – and this Commission cannot find – that Qwest is in compliance with the section 271 checklist requirements. Qwest now concedes – as it must – that, for years, it has been entering into secret interconnection deals with selected CLECs and granting them preferential terms that are not available to other CLECs. These secret deals were not an aberration. As the Arizona, Iowa, and Minnesota commissions have discovered only after protracted proceedings that Qwest attempted to derail, Qwest entered literally scores of unique interconnection agreements with more than a dozen CLECs that it did not file with the state commissions. These secret deals absolutely preclude a finding of section 271 compliance.

First, they quite clearly preclude Qwest from meeting its Section 271 checklist burden to demonstrate that it is presently providing interconnection and access to unbundled network

elements on nondiscriminatory terms.[1] It is a simple and undisputed fact that Qwest is giving some carriers better terms than others. Through its secret deals, Qwest provides favored CLECs with better prices, better provisioning, and special treatment when problems or disputes arise. For example, the Minnesota Department of Commerce ("MDOC") found that Qwest offered significant rate discounts on core interconnection, network elements and resold services in its secret deals with favored CLECs.[2] Similarly, the Arizona Corporation Commission ("ACC") staff found, based on Qwest's own description of its secret deals, that these deals encompassed such critical matters as provisioning and billing, dispute resolution, escalation procedures, and other key areas that gave the secret deals CLECs important advantages.[3] Such favored treatment is the very definition of discriminatory access.

Second, Qwest's misconduct corrupted the results of the independent third party testing of Qwest's wholesale provisioning performance, because the testing relied upon data provided by carriers whose performance results had been artificially enhanced by Qwest's secret deal accommodations. Because there is little real world competition in the five states in which Qwest seeks interLATA authority in these applications – and thus little real world performance data – Qwest cannot satisfy the OSS nondiscrimination checklist requirement without reliance upon this third-party testing data. But as KPMG, the third-party test adminstrator, has explained, there is simply no way of knowing whether the test results are "representative of the 'typical' CLEC experience, given the preferential treatment the [secret deals] CLECs may have received from

[1] *See* 47 U.S.C. § 271(c)(2)(B)(i) & (ii).

[2] MDOC Comments in Opposition To Qwest's Petition For Declaratory Ruling, WC Docket No. 02-89, at 2 (filed May 29, 2002) at 2 ("MDOC's Comments").

[3] *Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 15-16 ("*Arizona Report*").

Qwest."[4] It would be the height of arbitrariness to base a finding of adequate real-world OSS performance on test data that the test administrator refuses to certify as representative of real-world performance.

Third, the secret deals have materially tainted the record upon which Qwest relies in this proceeding. At the time these deals were struck, Qwest's soon-to-be secret partners were among the most active CLECs in terms of providing competing services in Qwest's region, were uniquely positioned to identify the specific ways in which Qwest was impeding competition, and were understandably unhappy with Qwest's services. It is now clear that Qwest obtained the brokered silence of these key CLECs and thereby concealed from state commission review Qwest's failure to satisfy a number of core checklist requirements. As a consequence, it would be arbitrary and capricious for the Commission to conclude, based upon the incomplete state records and absent further independent Commission investigation, that Qwest has satisfied its checklist obligations.

In short, Qwest is not providing nondiscriminatory access to its network, and its flagrant violations of the Act have fundamentally corrupted the entire record that underlies its application. Qwest nevertheless contends for the first time in its recently filed reply comments in its *other* pending section 271 proceeding – which, notably, focus on the secret deals issues in *this* proceeding – that the Commission can ignore these violations and grant its application despite the pervasive flaws in the present record. Qwest makes two broad arguments. First, it argues that AT&T has obscured the "forest" by focusing on a few "trees."[5] Second, Qwest contends that there is "no harm, no foul" because state commissions already have looked at the impact of

[4] Attached hereto as Attachments 1 & 2.

[5] Qwest Reply Comments (*Qwest II*) at 127-135.

the secret deals in the section 271 context and found no problem.[6] Neither contention can withstand review.

Qwest's contention that the Commission should focus on the "hundreds of interconnection agreements" Qwest has filed, rather than the many that it has failed to file,[7] is as irrelevant as it is misleading. It is irrelevant because compliance with sections 251 and 252 (and hence section 271 checklist compliance) does not turn on the percentage of interconnection agreements that have not been filed, or whether Qwest is discriminating in favor of two, ten or one hundred carriers. So long as Qwest fails to treat *all* carriers equally by offering them interconnection and access to network elements on the same terms and conditions, it is discriminating in violation of the Act and cannot establish present compliance with the checklist nondiscrimination requirements. In any event, as several state commissions have now found, Qwest's failure to file and make available to other carriers its discriminatory interconnection agreements was not an isolated oversight that affected only a handful of agreements, but a concerted region wide campaign that has already been demonstrated to involve dozens of secret interconnection agreements and, when the dust settles, may well be demonstrated to have involved many more.

Qwest also claims that "AT&T disregards the undisputed fact that many ILEC-CLEC contracts need not be filed and approved under Section 252(a)."[8] This too is entirely irrelevant. ILEC agreements that create "obligations in connection with sections 251(b) or (c)," are clearly interconnection agreements. Qwest has belatedly conceded that it failed to file many CLEC such agreements. Qwest complains that "the scope of mandatory filing obligations under Section

[6] *Id.* at 134-37.

[7] Qwest Reply Comments (*Qwest II*) at 127.

252(a)" is unclear.[9] But whatever gray areas there may be in this context, it is indisputable that Qwest has failed to file numerous agreements that meet any possible definition of interconnection agreement, including Qwest's own definition.

This is not just AT&T's view, but the view of the state commissions that have investigated Qwest's secret deals. For example, the Iowa Utilities Board held that secret deals were a "logical and necessary part[] of a comprehensive interconnection agreement," and "include interconnection agreement provisions that should have been filed with the Board pursuant to § 252."[10] The Board made clear that this was not a close question with respect to any of the agreements at issue.[11] Likewise, in finding that Qwest violated its filing obligations under section 252 by failing to file at least *25* agreements with the ACC, the Arizona commission's staff relied on Qwest's own description of the agreements as involving core interconnection terms.[12] And the MDOC found that agreements not filed by Qwest included those that provided CLECs "with significant discounts on all of their purchases from Qwest (including collocation, UNE and tariffed purchases)."[13] The Commission cannot permit Qwest to hide behind the claim that it was "unclear" whether these types of contracts are interconnection agreements that must be offered to other carriers on nondiscriminatory terms.

(. . . continued)
[8] *Id.*

[9] *Id.* at 128.

[10] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2, May 29, 2002, at 9, 10-15 ("*Iowa Order*").

[11] *See id.* at 11 ("there can be no serious argument" that the terms of the first agreement "are not properly considered a part of an interconnection agreement"); *id.* at 12 ("there can be no real argument" that the terms of the second agreement are "anything other than an interconnection agreement"); *id.* at 15 ("Qwest's own arguments establish" that the third agreement "is an interconnection agreement that must be filed with the Board").

[12] *See Arizona Report* at 15-16.

[13] MDOC Comments at 2.

Qwest's related argument that, even if the legal standard is clear, application of that standard is "fact-intensive" and is a "compliance matter" that is not "appropriate to a Section 271 analysis" is absurd.[14] It is clear under longstanding Commission precedent, as well as the *Notice* in this proceeding, that Qwest, not its opponents, has the burden of proving that it complies with the checklist. *Massachusetts 271 Order*, 16 FCC Rcd. 8988, ¶ 11 (2001) ("The BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement"). "In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis." *Id*.; *Qwest I Notice*, DA 02-1391 (June 13, 2002) (Qwest has "burden of proof" in this proceeding). Thus, to the extent that there is an issue of contested fact on whether a BOC has satisfied a core checklist item, and the BOC has failed to make a record that is sufficient to resolve the issue, the only result can be denial of the application. This is particularly true when, as here, there have been repeated state commission factual findings that the BOC is failing to comply with a core market opening provision of the Act that is codified in the section 271 checklist.

Qwest does not deny that several independent state entities have found that it failed to file interconnection agreements and thus failed to make the terms of those discriminatory agreements available to others. Likewise, Qwest does not even purport to claim that it has created a record that would allow the Commission to find that it has *in fact* satisfied checklist items 1 and 2. To the contrary, Qwest expressly disclaims having done so. Qwest Reply Comments (*Qwest II*) at 132 ("[T]he record here does not permit the Commission to reach any conclusions."). Qwest has therefore conceded that it has not met its burden of proving that it has satisfied the checklist.

[14] Qwest Reply Comments (Qwest II) at 130-34.

Accordingly, the only lawful course for the Commission to follow is to deny Qwest's application.

Lacking any credible argument on the law, Qwest resorts, in the end, to appeals to equity. Qwest says that the Commission must take account of the "fact" that Qwest has cooperated with the MDOC investigations into the secret deals.[15] But Qwest began "cooperating" only after commissions in several states had exposed so many flagrant violations of the Act that denial was no longer a credible option. And even now, as explained below, Qwest is still not willing to file all the agreements required by section 252(a) and continues to fight a rear guard action to establish loopholes that would allow it to keep numerous agreements from being brought to light and made available to all carriers.[16]

Qwest maintains that the state commissions that have investigated its secret deals have found that Qwest's "lapses in compliance with Section 252" are irrelevant for section 271 purposes.[17] Rather than absolving Qwest, the state commission findings doom the Application. For example, the Iowa Utilities Board ("IUB") found that the secret deals "b[ore] directly and materially upon" section 271.[18] The Nebraska Public Service Commission likewise found that "secret deals" "flaunt the intent of the Act" and "taint the 271 process."[19]

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[15] *Id.* at 129-30.

[16] Qwest's screed against the MDOC, which has concluded that Qwest failed to file 11 interconnection agreements with CLECs in Minnesota – is no rebuttal at all. *Qwest II,* at 127-18 & n.101. The sole "evidence" that Qwest offers as to MDOC's bias is the fact that it is rigorously examining Qwest's section 271 application, and has to date found that Qwest has not opened its local markets to competition. *Id.* The only thing the MDOC is guilty of is insisting upon enforcing the Act in order to protect consumers and competition in that state. Indeed, it is notable that Qwest only disputes the findings of the MDOC, and not those of the Iowa Utilities Board or the ACC staff, which have also found that Qwest violated its obligations under the Act. *See id.* at 130-33.

[17] Qwest Reply Comments (*Qwest II*) at 137.

[18] Order to Consider Unfiled Agreements, Dockets Nos. INU-00-22, SPU-00-11, at 4, 7 (Iowa Utils. Bd. June 7, 2002). The IUB further ordered Qwest to file its secret deals, and for that reason, found that AT&T's motion to reopen the proceeding was largely moot.

[19] Motion to Reopen 271 Proceedings Denied, Application No. C-1830, ¶ 10 (Ne. PSC June 12, 2002).

Although the state commissions in Nebraska and North Dakota decided against reopening the state section 271 proceeding to examine the secret deal issue, these commissions did not, as Qwest falsely asserts, "reject[] AT&T's position" concerning the relevance of the secret deals.[20] To the contrary, they declined to reopen the state proceedings because they agreed with Qwest's argument that *this Commission* would be addressing the secret deals issue and, therefore, there was no need for the state commissions to act.[21] As one North Dakota Commissioner put it, because this issue was on this Commission's "radar screen," this Commission, rather than the state commission, should "deal with it in due course."[22] Given Qwest's advocacy before the states, Qwest's claim that "this is not the proceeding for the Commission to prejudge the outcome of pending proceedings regarding specific Qwest-CLEC contracts being litigated at the state level" should be dismissed out of hand.

To be sure, in deciding not to reopen the state 271 proceedings, the Colorado commission implicitly found that post-approval enforcement could substitute for determining whether Qwest currently satisfies the checklist's non-discrimination requirements,[23] but such a finding cannot be squared with the Act's clear mandate that demonstrating present compliance is a checklist

[20] Qwest Reply Comments (*Qwest II*) at 135.

[21] Motion to Reopen 271 Proceedings Denied, Application No. C-1830, ¶ 10 (Ne. PSC June 12, 2002) ("In summation, while these matters are deeply troubling, they serve as notice that ongoing oversight is absolutely necessary. However, inasmuch as this issue is presently before the FCC, the Nebraska Commission, at this time, denies AT&T's Motion to Reopen the 271 proceeing); Transcript of Special Meeting, Case No. PU-314-97-193 (North Dakota PSC June 6, 2002).

[22] Transcript of Special Meeting, Case No. PU-314-97-193, at 5 (North Dakota PSC June 6, 2002) ("Qwest's application I assume with the next few weeks is going to be before the FCC. The FCC knows about [the secret deals issue], has [it] on their radar screen, and if they're very concerned about the impact of this interconnection agreement issue with the 271 issue, then they'll certainly have that on their radar screens and if they have great concern about it, they'll be able to deal with it in due course.") (Commissioner Clark).

[23] Order Denying Motion, Docket No. 02M-260T, ¶ 6 (PUC Co. May 29, 2002).

precondition to Section 271 approval.[24] Nor could any such finding absolve the Commission of conducting its independent evaluation of whether Qwest has satisfied the checklist.

Qwest also grossly mischaracterizes the conclusions of the DOJ. The DOJ expressed no opinion on whether the secret deals issue should be deferred to a separate proceeding, stating only that "the Department defers to the Commission's assessment of whether Qwest's earlier failure to file these agreements violated Sections 251 or 252."[25]

Qwest argues that AT&T is attempting to raise "collateral issues" that "would cast the Section 271 process adrift from its statutory moorings."[26] But it is hard to imagine an issue more central to the section 271 process. AT&T's claim – now effectively conceded – is that Qwest failed to comply with the most central section 251(c) obligations – *i.e.*, providing nondiscriminatory interconnection and access to unbundled network elements. These obligations in turn are the first two checklist items for section 271. As the Commission has explained, to satisfy section 271, "the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis."[27] Thus, there can be no debate that the issues AT&T has raised go to the heart of whether "the BOC's local market is . . . open to competition."[28]

In sum, Qwest was fully aware its discrimination agreements and made the decision to not to cure it, not to allow KPMG to assess the impact of the secret deals on its OSS tests, and not to allow all CLECs to submit evidence regarding the impact of the secret deals. Qwest

[24] *See* 47 U.S.C. § 271(c)(2).

[25] DOJ Comments (*Qwest II*) at 3 n.6.

[26] Qwest Reply Comments (*Qwest II*) at 138.

[27] *Massachusetts 271 Order* ¶ 11.

[28] *Michigan 271 Order,* 12 FCC Rcd. 20543, ¶ 397 (1997).

instead simply rolled the section 271 dice. Having made that choice, Qwest must make its case on the incomplete and fatally corrupted record it caused. And on that record, there can be no outcome but denial of Qwest's application for failing to provide nondiscriminatory interconnection and access to network elements.

II. ANY WAIVER OF THE COMPLETE WHEN FILED RULE TO CONSIDER QWEST'S LATE-FILED SECRET AGREEMENTS EVIDENCE WOULD BE PATENTLY ARBITRARY.

As the 90 day statutory period comes to an end, Qwest has finally come to grips with what was obvious from the outset – it cannot possibly meet its checklist nondiscrimination burden if it is favoring some CLECs with interconnection agreement terms that are not available to others. Qwest seeks permission to address that clear deficiency with the last-minute posting of previously-unfiled interconnection agreements to its corporate website and the promise to, at some point, submit those (and other unidentified "confidential") agreements for state commission approval. As explained below, Qwest's late-filed evidence could not cure its section 271 deficiencies even if it could be considered. But the Commission's own rules make clear that this "new information" – information that quite plainly could and should have been filed with the Application – may not be considered at all.

The Commission has repeatedly stated that its "general rules for consideration of late-filed information" provide that "new information" filed "after the comment date" should be "accord[ed] . . . no weight in determining section 271 compliance."[29] This "complete-as-filed" rule is necessary "to afford interested parties a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commission can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the

[29] *Rhode Island Order* ¶¶ 7, 8.

record."[30] Although the Commission can waive the rule "if special circumstances warrant a deviation from the general rule,"[31] the BOC must "satisfy a high bar," and a waiver is "rare[ly]" appropriate.[32] There is no conceivable basis for a waiver of the general rule here to rescue Qwest from the necessary and entirely predictable consequences of its own deliberate decision to proceed with the Application without addressing its secret deals discrimination.

This is not a case in which the Applicant has been caught off-guard by circumstances that "changed outside of its control,"[33] or new arguments that have previously received little attention. To the contrary, Qwest knew everything it needed to know to make its August 20 proposal long before it filed its Application. There have been no changed circumstances or new developments whatever, much less any beyond Qwest's control. And the section 271 implications of Qwest's unfiled interconnection agreements and discrimination were front and center in every state proceeding. Qwest knew to a certainty that failing to make all of its secret interconnection agreements available to other CLECs would impair its ability to demonstrate compliance with the checklist nondiscrimination requirements, and Qwest nonetheless intentionally elected to go forward with its Application without addressing that problem.

Instead, Qwest attempted to hide the problem by claiming in a frivolous petition for a declaratory ruling that it needed the Commission's guidance to make the "tough judgment calls" whether its secret deals were, in fact, "interconnection agreements." As is now obvious from even a cursory review of the secret agreements that Qwest has posted to its website, that claim was, at best, disingenuous. These unfiled agreements, like many others that state commissions

[30] *Id*. ¶ 7.

[31] *Id*.

[32] *Kansas-Oklahoma Order* ¶ 22.

[33] *Rhode Island Order* ¶ 9.

have previously reviewed, change core interconnection and network element price and non-price terms, and there can be no serious argument that they are not interconnection agreements that Qwest was required to file and make available to other carriers. There may, in theory, be some tough "interconnection agreement" calls at the margins, but Qwest's secret deals are clearly interconnection agreements far removed from any gray area.

The only judgment call that Qwest made here was whether to come clean before filing its application or to roll the dice and hope that the issue would escape notice. Qwest chose the latter course, apparently in part in hopes of reducing the risk of fines for failing to file the agreements.[34] In short, Qwest did everything in its power to prevent informed and orderly review of its compliance with the section 271 nondiscrimination requirements, and it would be the height of arbitrariness for the Commission to reward that misbehavior now.[35]

Nor is this a case in which the new information at issue is "quite limited in nature" and "places a limited additional analytical burden on the Commission staff and commenting parties."[36] To the contrary, as detailed below, Qwest's August 20 proposal places literally scores of unfiled interconnection agreements at issue and raises a key inquiry upon which neither the parties nor the Commission staff can meaningfully comment in the limited time remaining in this proceeding: are the unfiled interconnection agreements that Qwest has belatedly and reluctantly posted on its website (and submitted to state commissions) *all* of the unfiled interconnection agreements in the five states at issue? Qwest's track record in state proceedings that have conducted such inquiries confirms beyond doubt that the Commission could not rationally

[34] *See Qwest Secret Deals Ex Parte* at 2 ("Qwest naturally has been concerned about its potential penalty liability with regard to . . . its past filing decisions").

[35] *See*, *e.g.*, *New Hampshire Order* ¶ 9 (stressing that late BOC submission satisfied "special circumstances" test only because it responded to developments "outside of its control" and was not attempting to game the system).

[36] *Kansas-Oklahoma Order* ¶ 23.

assume that Qwest has submitted all of the relevant agreements. Rather, independent investigation that could not be accomplished in the few remaining days would be required to answer that question.

There is no meaningful way, for example, for the parties or the Commission to (i) evaluate the largely undisclosed specific criteria that Qwest employed in identifying the unfiled agreements that met its self-defined "interconnection agreement" standard, or (ii) determine whether the agreements Qwest has posted (and claims it will later post) even include all of the Colorado, Iowa, Idaho, Nebraska and North Dakota agreements that have been previously disclosed (but never filed) in other state secret deals proceedings.

Even if parties could use all of the previously disclosed agreements (many of which are subject to protective orders) here, Qwest's August 20 *ex parte* makes clear that its August 22 website posting of some interconnection agreements will, at some unspecified future date, be supplemented with "confidential" interconnection agreements that Qwest claims to have filed with state commissions "under seal." Thus, the supplemental comment period (or even the 90-day statutory period) will likely be closed before the parties and the Commission even know exactly what Qwest has filed with the state commissions in these five states. Placing the parties and the Commission in the impossible position of evaluating a moving target at (or after) the last minute is precisely what the complete-as-filed rule is designed to avoid, and reaching out to *speculate* that Qwest's new proposal has put a sudden end to its pervasive and indisputable discrimination would end any pretense that the Commission takes its complete-as-filed rule seriously.

Qwest's late-filed secret deals information also rests on "promises of future actions, which may or may not actually take place," and that the Commission has consistently recognized

are particularly inappropriate candidates for waiver of the complete-as-filed rule.[37] Merely disclosing previously unfiled agreements or even submitting them to state commissions cannot alone cure Qwest's discrimination. Rather, discrimination will continue until the previously unavailable terms of those secret interconnection agreements are, in fact, available to other carriers. Qwest expresses hope that this will happen "as soon as reasonably practicable,"[38] but there is no guarantee that will happen, particularly given the odd procedural posture of a request for approval of agreements that Qwest claims are not interconnection agreements (and hence are outside the scope of state commission authority under section 252(e)).

To make matters worse, Qwest's position remains that because these agreements are not "interconnection agreements" subject to state commission approval, Qwest, not state commissions, will decide which terms of those agreements it will make available to other carriers.[39] That raises yet another complication in reviewing the late-filed evidence: the need to determine whether the limited terms that Qwest has "identif[ied] and "bracket[ed]" on the just-disclosed interconnection agreements as available to other carriers are enough to cure the discrimination problem even with respect to those particular agreements.[40]

Moreover, the August 20 ex parte submission of new secret deals information and proposals is already Qwest's *second* post-comment bite at the secret deals apple. In its reply comments, Qwest violated the complete-as-filed rule in urging the Commission to rely upon its promise to "post on its web site all contracts with CLECs in states where it had Section 271 applications pending insofar as those contracts contained effective going forward obligations

[37] *Okahoma-Kansas 271 Order* ¶ 23.

[38] *See* Qwest Secret Deals Ex Parte at 3

[39] *See id*. at 2.

[40] *Compare Kansas-Oklahoma Order* ¶ 23 n.63 ("there is no uncertainty concerning the availability of these [late-
(continued . . .)

related to Section 251(b) and (c)."[41] Qwest's position then was that it would *not* submit the interconnection agreements to state commissions for approval, but "would make available such going forward terms to other CLECs under the same policies that apply under Section 252(i)."[42]

Now, after "additional consideration" – presumably, the recognition that mere promises to end its pervasive discriminatory practices lack the legal obligation necessary to satisfy checklist requirements,[43] – Qwest proposes to take "a further step" to secure the Commission's grant of Section 271 authority to Qwest in Colorado, Idaho, Iowa, Nebraska and North Dakota: actually filing the agreements with the states (under seal and thus insulated from review by the parties and the Commission).[44] But the Commission has repeatedly stated that even in situations where a single late-filed submission might warrant a waiver, repeated last-minute changes that create a moving target and "game" the section 271 process cannot be tolerated.[45]

It is also important to recognize that Qwest's multiple submissions of new secret deals information are by no means the only post-comment information upon which Qwest seeks to rely. To the contrary, the record upon which Qwest urges the Commission to rule bears *no* resemblance to the case Qwest urged in its application. Virtually all of the UNE rates at issue were filed after the comments (indeed, in most cases, after the reply comments).[46] Qwest

(. . . continued)
filed] rates to competing LECs").

[41] Qwest Reply at 131-32.

[42] *Id.*

[43] *See, e.g., Texas 271 Order* ¶ 38 ("promises of future performance . . . have no probative value in demonstrating [a BOC's] . . . present compliance with the requirements of section 271").

[44] *See* Qwest Secret Deals Ex Parte at 3-4.

[45] *See*, *e.g.*, Oklahoma-Kansas Order ¶ 27 ("We have already made clear that we do not expect applicants to do this repeatedly and we will look with disfavor on any situation in which a single applicant attempts to make . . . [changes] late in the application review period on multiple occasions").

[46] Reply Comments in this proceeding were filed on July 26, 2002. Qwest filed new SGATs with this Commission containing new rates on which Qwest intends to rely for Section 271-approval on August 8 & August 9. *See Ex*
(continued . . .)

continues to modify, amplify, or clarify its OSS assertions almost on a daily basis with *ex parte* submission after *ex parte* submission, and there is no end in sight.[47] After vehemently denying that its pervasive "IRU" arrangements are services (as opposed to "asset sales"), Qwest has now admitted to the SEC that those arrangements are, in fact, services – and thus, as AT&T and others have demonstrated, that Qwest is presently violating section 271.[48] And Qwest's GAAP accounting position – critical to the required showing of compliance with section 272, *see* 47 U.S.C. § 271[49] – remains in flux to this day.

(. . . continued)
Parte Letters from David L. Sieradzski (Qwest) to Marlene H. Dortch, WC Docket No. 02-148 (filed August 8 & August 9).

[47] For example, Qwest filed its *Qwest I* application on June 13, 2002. On July 2, Qwest filed an *ex parte* – styled as an "errata" – that revised many of the statistics in the OSS declaration and added new exhibits, including a revised "adequacy study" by KPMG (concerning performance measurements for the accuracy of manual processing), a revised "CLEC participation study" by KPMG (concerning the effects of the secret agreements on the OSS test), and an errata to KPMG's Final Report on the ROC OSS test. *Ex parte* letter from Peter A. Rohrbach, *et al.*, dated July 2, 2002. On July 10, Qwest filed a voluminous *ex parte* that, *inter alia*: (1) provided a summary of the history of KPMG's testing of Qwest's daily usage files; and (2) attempted to show that its manual error rate was low by providing, for the first time, its internal data on application date accuracy and rejects in error. *Ex parte* letter from Peter D. Shields, dated July 10, 2002. On July 12, Qwest filed one *ex parte* admitting that the data on "service order accuracy" in its application was erroneous and submitted a "corrected table with additional detail," and a separate *ex parte* providing additional data on LSRs that were rejected in error. *Ex parte* letters from Horace Haney, dated July 12, 2002. On July 15. 2002, Qwest filed two *ex partes* providing additional information regarding its SATE test environment, including a new table describing the percentage of production errors available in SATE. *Ex parte* letters from Linda L. Oliver and Horace Haney, dated July 15, 2002. On July 25, Qwest filed an *ex parte* providing additional details regarding the auditability of its bills, including – for the first time – an identification of specific vendors from which CLECs can purportedly obtain software and/or services to audit bills. *Ex parte* letter from Yaron Dori, dated July 25, 2002. On the same day, a separate *ex parte* from Qwest provided "evidence" regarding integration of pre-ordering and ordering functions by New Access (a CLEC not identified in Qwest's application) and several pages of "further information" regarding integration. *Ex parte* letter from Sumeet Seam, dated July 25, 2002. On July 29, Qwest filed two ex partes that (1) provided LSR rejection rates for New Access, as well as rejection rates experienced by Hewlett-Packard during its integration testing; and (2) provided flow-through rates for individual CLECs in June 2002. *Ex parte* letters from Sumeet Seam and Christopher L. Killion, dated July 29, 2002. And this partial listing of Qwest's *ex* partes does *not* take into account the plethora of additional *ex partes* that Qwest has filed during August 2002.

[48] *See Ex Parte Letter* from Mark Schneider and C. Frederick Beckner III (AT&T) to Marlene Dortch (FCC) (August 15, 2002) ("*AT&T IRU Ex Parte*") (*citing* Qwest submissions).

[49] The Commission has stressed that "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field." *Texas 271 Order* ¶ 395 (quoting *Michigan 271 Order* ¶ 346). Therefore, the Commission has determined that "[a]s a pre-condition to entry under section 271," *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 2, Qwest and its section 272 affiliate must present evidence, not "paper promises," that establishes they will comply "with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B); *Michigan 271 Order* ¶ 55 (holding that (continued . . .)

In sum, the late-filed secret deals information is part of an unprecedented pattern of complete-as-filed violations.[50] No section 271 applicant – certainly, no successful section 271 applicant – has ever exhibited such extraordinary disdain for the Commission and its rules. Qwest is plainly of the view that the Commission lacks resolve to apply its own rules (or the plain terms of the Act). And that is exactly the message that will be sent if the Commission allows Qwest to game the process in this fashion – a waiver of the complete-as-filed rule could hardly be said to provide "positive reinforcement"[51] to Qwest for responding to a limited new issue that arose because of events outside of Qwest's control. The Commission should place no weight upon Qwest's last minute secret deals information. Rather, it should evaluate the application as filed, and find that Qwest has not met its burden.

This is not merely a question of doing the right thing as a policy matter. The Commission's rules and its previous decisions applying those rules establish limits on the exercise of discretion. *See*, *e.g.*, *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999) (agency's waiver of its procedural rules must comply with the Administrative Procedure Act). Thus, the courts of appeal have repeatedly struck down an "agency's failure to enforce such a procedural rule uniformly." *Hooper v. NTSB*, 841 F.2d 1150, 1150 (D.C. Cir. 1988) (citing *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985); *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986)). "A sometimes-yes, sometimes-no, sometimes-maybe policy of deadlines cannot . . . be squared with our obligation to preclude arbitrary and capricious

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(. . . continued)
"paper promises" cannot satisfy the BOC's burden under § 271).

[50] *See*, *e.g.*, *Rhode Island Order* ¶ 13 ("As we have made clear . . . we do not intend to allow a pattern of late-filed changes to threaten the Commission's ability to maintain a fair and orderly process for consideration of section 271 applications").

[51] *Kansas Oklahoma 271 Order* ¶ 25.

management of an agency's mandate." *Green Country*, 765 F.2d at 238 (quoting *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984).

III. QWEST'S NEW PROPOSAL HAS NOT CURED, AND COULD NOT CURE, THE DISCRIMINATION AND OTHER SECRET DEALS-RELATED DEFICIENCIES IN THIS APPLICATION.

Even if Qwest's last minute secret deals information and proposals could be considered in this proceeding, they could not cure any of the secret deals-related deficiencies in the Application. The new information is not designed to, and could not, *in any way* address the disabling taint that Qwest's secret deals discrimination had on the third party OSS test results or the broader record. And a careful review of Qwest's proposal, its undisputed past practices and the unfiled agreements that have come to light in ongoing state secret deals proceedings confirm that Qwest has not – and could not at this late date – cure the core discrimination problem.

At the outset, Qwest has not provided sufficient information to allow the Commission to support a reasoned finding that the last-minute filings have fully (or even largely) cured ongoing discrimination in each of the five states; indeed, Qwest has taken steps actively to prevent the Commission from making that necessary finding. In this regard, it would clearly be reversible abdication for the Commission simply to trust Qwest's entirely unsupported claim that it has now filed all previously-concealed interconnection agreements. It is Qwest's burden to *prove* that with record evidence, and Qwest's conduct in the state secret deals proceedings – narrowing the scope of the term "interconnection agreement" beyond all reasonable bounds, producing interconnection agreements only after legal compulsion, and forcing the states to rely upon data requests to CLECs to obtain a full record – precludes any rational finding that Qwest has met that burden with its *ex parte* promises.

The Commission cannot lawfully ignore that the burden here is on Qwest or excuse Qwest's failure to meet that burden by shifting to commenting parties the burden of proving that

there are additional unfiled interconnection agreements that Qwest has not yet disclosed. Only Qwest has complete information about the secret interconnection agreements it has entered, and Qwest has taken every possible step to prevent those agreements from coming to light. Although a few state commissions have laudably taken it upon themselves to demand that Qwest disclose all such agreements, the states at issue here have, for the most part, not yet done so. There is accordingly a very limited record to which commenting parties and the Commission may turn to attempt to verify Qwest's bare claim that all secret deals in the five states have been filed.

Nonetheless, AT&T's extremely expedited review of agreements in Minnesota, Iowa and Arizona public records – many of which are multi-state agreements that cover one or more of the states at issue in this proceeding – has confirmed that Qwest has not even fully complied with the disclosure and filing standard it announced in its August 20 ex parte. Rather, as detailed below and in the accompanying declaration of Kenneth L. Wilson, there are a number of relevant unfiled interconnection agreements that do not appear on Qwest's website list of the public agreements it claims to have filed. If AT&T had the time or the authorization to comment here upon the many more agreements that remain subject to protective orders, additional examples of Qwest's continued noncompliance with its own announced standard could be provided. Qwest will likely have excuses (and lacking excuses will likely promise to supplement its filing with these additional agreements), but this starkly illustrates the lunacy of attempting to make a rational finding on this record, and at this late date, that Qwest has cured its pervasive discrimination.

In all events, Qwest's proposed filing standard is vastly underinclusive given what we already know about Qwest's secret deals practices. Qwest proposes to file only agreements that specifically establish ongoing obligations under sections 251(b) and (c), but, as detailed below,

state commission investigations have revealed that Qwest used sham side deals to *purchase* services from CLECs as vehicles to provide secret network element and service discounts to favored CLECs. Under Qwest's proposal, it would have no obligation to file anything reflecting those discounts or to make the discounts available to other carriers. Similarly, Qwest's proposal is riddled with "settlement," "bankruptcy" and other filing exceptions that have no basis in the statute and have nothing to do with whether the secret deals are interconnection agreements that must be made available to other carriers. In sum, Qwest's last-minute efforts are not only far too late, but far too little.

A. Qwest Is Still Discriminating And The Commission Cannot Reasonably Rely On Qwest's August 20 Proposal To Cure The Discrimination.

Qwest is not presently providing nondiscriminatory access. It remains true today and will remain true at the close of the 90-day statutory period that Qwest favors some CLECs in each of the five states at issue with discriminatory interconnection terms that are not available to others. Although Qwest claims to have set in motion actions that will *eventually* legally obligate it to stop this discrimination and force it to make these terms available to others, that has not yet happened. As a result, the Commission could not find, as the checklist requires, that Qwest is *presently* providing nondiscriminatory access to interconnection and network elements.[52] Indeed, given Qwest's attempt to have it both ways – refusing to concede that state commissions even have section 252 jurisdiction over these agreements, yet asking them to exercise section 252 jurisdiction to approve portions of the agreements – the Commission cannot even be confident that the state commission processes that Qwest has just initiated will, in fact, overcome procedural and jurisdictional hurdles and expeditiously establish legal obligations on Qwest to

[52] *See Texas 271 Order* ¶ 38 ("[i]n order to gain in region, InterLATA entry, a BOC must support its application with actual evidence demonstrating its *present* compliance with the requirements of section 271") (emphasis in (continued . . .)

provide the discriminatory terms to others. Nor can the Commission assure itself in the few remaining days that Qwest has not succeeded, with its unprecedented and unilateral attempts to limit state commission review to specific provisions that Qwest deems relevant, in insulating important provisions of these agreements from opt-in by other carriers.

There is no basis for a Commission finding that Qwest has even filed all of the relevant interconnection agreements. But even if Qwest's last minute promises of future action could, in *theory*, be sufficient to satisfy its checklist burden, there is simply no way that the Commission could support a reasoned finding that Qwest has, in *fact*, filed all of the previously unfiled interconnection agreements that it has, for years, worked so hard to conceal. It is Qwest's burden to prove that the problem has been corrected, and Qwest has not provided any of the information that would be necessary to verify Qwest's bare claim.

It is important to recognize that it would be entirely arbitrary for the Commission simply to accept on faith Qwest's very recent promise abruptly to reverse course. The Commission cannot pretend that Qwest is operating on a clean slate here. Qwest has a long history of agreeing to private, discriminatory terms and conditions for interconnection and resisting state commission efforts even to identify the full set of these secret interconnection deals. The existence of secret agreements, which date back several years, was placed in the public eye on February 14, 2002 by the MDOC, which filed a complaint with the Minnesota Public Utilities Commission ("MPUC") concerning Qwest's practice of entering these agreements.[53] More than six months later, Qwest continues to resist efforts to identify the full scope of its existing body of secret deals.

(. . . continued)
original).

[53] *See* Arizona Report at 2.

Rather than submit all of its agreements with CLECs to each of the state commissions once its secret deals campaign was revealed, accept state commission review and approval of those that are clearly interconnection agreements, and attempt to defend any claim that some of its secret deals are not, Qwest has stonewalled. Qwest resisted disclosure of the agreements placed into issue by the MDOC, the IUB, and the ACC, and forced each state to compel the provision of agreements for review. In Iowa, Qwest initially provided only three of the eleven agreements contained in the MDOC complaint, and in March, Qwest moved to dismiss AT&T's request for an Iowa proceeding.[54] In April, Qwest filed its declaratory ruling request with the Commission, and subsequently opposed a motion for the issuance of subpoenas and sought to stay the entire proceeding in Iowa pending the Commission's ruling on that sham request.[55] In late July, in compliance with the May 29 Order of the IUB, eleven additional agreements were made public by the IUB, and proceedings are continuing with the possibility that yet more agreements will be required to be disclosed.

Similarly, in Arizona, the ACC's staff requested that Qwest provide any agreements subject to Section 252, and later sought similar information from CLECs operating in Arizona. In March, Qwest initially provided only the agreements identified in the MDOC complaint.[56] After further state proceedings and requests from the ACC staff, Qwest grudgingly provided additional agreements, all subject to a confidentiality order that keeps the agreements under seal. Unwilling to rely solely upon Qwest, the ACC and its staff felt compelled to request CLECs to identify any unfiled agreements with Qwest.[57] The ACC staff has already determined that at

[54] *See* Iowa Report at 23.

[55] *Id.*

[56] Arizona Report at 3.

[57] *Id.* at 4.

least 28 of Qwest's secret deals are interconnection agreements that should have been filed, and a number of other agreements still are subject to review pursuant to the ongoing regulatory process that remains subject to a confidentiality order.

In states that have not taken such proactive stances – including four of the states at issue here – Qwest has been even less forthcoming. Qwest's practice has been to disclose only the multi-state agreements that Minnesota and Iowa have conclusively determined are interconnection agreements and not to make any effort to identify and file other unfiled agreements in Colorado, Idaho, Nebraska and North Dakota. And the August 20 proposal confirms beyond doubt that, even in the face of the Minnesota, Iowa and Arizona proceedings and orders, Qwest continued to conceal a great many discriminatory interconnection agreements that applied in these states and only acted here when it recognized that this Application was in trouble.

On this record, the Commission simply cannot reasonably rely on Qwest to self-police its newly-professed desire to file all of the requisite agreements that will reverse the years-long pattern of non-compliance. Qwest must *prove* that it has done so, if it is to meet its checklist burden, and it has not done that.

Nor could the Commission accept Qwest's burden and fill this gap. Qwest has not provided any explanation of how it applied its new standard to determine whether particular secret deals "creat[e] on-going obligations that relate to Section 251(b) or (c)."[58] Indeed, Qwest has not even yet identified all of the agreements it believes fit this standard (although it claims to have filed them "under seal" with the state commissions). Qwest has not provided the

[58] Qwest Secret Deals *Ex Parte* at 2. Qwest has just today consented to AT&T's use of agreements subject to the Arizona protective order – *if* AT&T also obtains the consent of each of the other parties to the agreements. AT&T has begun contacting each of the other CLECs, and has received Eschelon's consent to publicly disclose any of its (continued . . .)

Commission with the secret deals it determined were not interconnection agreements or even any *examples* of the agreements that were excluded. And the Commission (and the parties) are effectively disabled from looking to other sources of previously unfiled agreements to verify Qwest's claim that all relevant agreements have been filed because most of the agreements that other states have compelled Qwest and others to disclose were produced subject to protective orders.[59]

Moreover, the problem here is not merely in determining whether Qwest has filed all *written* interconnection agreements, because the Minnesota and Arizona records make clear that Qwest's practice has been to discriminate through *oral* interconnection agreements as well. As the Minnesota Department Of Commerce ("MDOC") has shown, for example, that Qwest and McLeod entered into oral agreements whereby "Qwest would provide discounts to McLeod for all purchases made by McLeod from Qwest;" these discounts "ranged from 6.5% to 10% depending on the volume of purchases made" by McLeod.[60] The MDOC's investigation revealed that Qwest did not want to put the discounts in writing, and was "concerned that other CLECs might feel entitled to the same discount if the agreement were written and made public."[61] These clandestine oral discount agreements (which, as discussed below, were later supplemented with written sham side deals that Qwest claims are unrelated to section 251) accompanied the secret written agreements with McLeod that were part of the MDOC

(. . . continued)
unlawful agreements in this proceeding.

[59] Wilson Decl. ¶ 8. AT&T is in the ongoing process of reviewing confidential agreements under seal and attempting to obtain the authorization to make these agreements public.

[60] *See, e.g.*, Supplemental Testimony of W. Clay Deanhardt, July 24, 2002 at 2, 9. The current proceedings before the MPUC are being undertaken confidentially under seal. The report provided here is based on the redacted version of Mr. Deanhardt's testimony.

[61] *Id*. at 8-9.

Complaint, and were joined with an oral agreement for McLeod "not to participate in proceedings considering Qwest's Section 271 application."[62]

The prevalence of significant oral agreements has been confirmed by the Arizona staff's latest report. In that report, the Arizona staff found "that two carriers had oral agreements with Qwest, Eschelon and McLeod."[63] For example, in "the case of McLeod, there was an oral agreement concerning additional product amounts to be purchased by Qwest under a written purchase agreement. With this agreement, there was also an oral agreement between Qwest and McLeod that McLeod would not oppose Qwest's 271 application as long as Qwest was in compliance with its agreements and all applicable statutes."[64] The Arizona staff noted that the data responses to their inquiries "also indicated that Qwest had both written and/or oral agreements with XO, Z-Tel (for 60 days only), Eschelon and McLeod wherein these CLECs agreed not to oppose Qwest's 271 application or participate in 271 proceedings."[65] Qwest has not even provided the Commission with any assurances, much less any means to verify that no such agreements exist in the five states at issue here.

In short, Qwest has prevented verification of its wholly unsupported claim that it has filed all of its previously unfiled Colorado, Iowa, Idaho, Nebraska and North Dakota agreements. All of the relevant information is in Qwest's possession, and Qwest has not provided it.[66]

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[62] *Id.* at 5.

[63] *Arizona Supplemental Staff Report*, at 5.

[64] *Id*.

[65] *Id*. at 7.

[66] Moreover, the law ordinarily teaches that "the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." WIGMORE ON EVIDENCE § 285 (1940); see also McCORMICK ON EVIDENCE § 272 (1984) (espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would (continued . . .)

Qwest has failed to comply even with its own filing standard. Although Qwest's failure to meet its burden of proof alone compels denial of this Application, the limited public information that is available for use in this proceeding confirms that Qwest has *not*, in fact, submitted even all of the agreements that clearly meet its own new filing standard. In response to the Commission's public notice, AT&T is conducting an expedited review of the public agreements available from the Iowa, Minnesota and Arizona secret deals proceedings. Many of those agreements are multi-state agreements that apply to one or more of the states at issue in this proceeding.

As explained in Mr. Wilson's declaration, despite the significant impediments to a sufficient review and comparison, it is clear that Qwest has not placed on its website, or otherwise made public all of the interconnection agreements in effect in the five states that are the subject of Qwest's Application. Based upon its ongoing review, AT&T has identified a number of agreements that are plainly interconnection agreements and that apply to one or more of these five states but that Qwest has not posted to its website. These agreements cover a number of areas and many of them are with CLECs with respect to which Qwest *has* disclosed other secret deals.

Qwest has entered into a series of secret deal agreements with Eschelon over that past several years. Although some of these deals have either expired or been superceded, and some have recently been posted by Qwest, others have not. A July 31, 2001 agreement provides Eschelon with special access to Qwest personnel for the purpose of addressing interconnection problems that might arise. Specifically, the agreement includes an eight page attachment called

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elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (footnote omitted)).

(continued . . .)

"Eschelon Escalation Tier Contact Information," which contains detailed information on specific Qwest personnel, as well as phone and pager numbers to call for every type of foreseeable interconnection problem that Eschelon might encounter. In effect, Eschelon has direct access to the Qwest operations centers for the purpose of solving interconnection-related problems.

Eschelon also entered into a secret deal agreement with Qwest titled "Confidential/Trade Secret Stipulation Between ATI and US WEST," and dated February 28, 2000. This agreement contains several important interconnection-related provisions that were not available to other CLECs. First, Qwest agreed to implement special Direct Measures of Quality (DMOQs) for Eschelon and promised to provide Eschelon with customized performance measures called "Service Performance Measures" (SPMs). The SPMs are designed to provide minimum performance standards for the DMOQs. Qwest does not offer or notify other CLECs that specialized performance metrics with custom thresholds are available. Second, Qwest agreed to waive Termination liability assessments (TLAs) for the migration of Qwest customers to ATI/Eschelon in Minnesota. This provision was not available to other CLECs and, in fact, Qwest was fighting to maintain for every state TLA on migrations in § 271 workshops. Third, Qwest committed to a dedicated provisioning team for ATI/Eschelon including the assignment of a full time Qwest employee as an on-site "Coach" for a period of at least six months. This coach was specified by name and was to help ATI/Eschelon full-time with ordering and provisioning problems with Qwest services. This type of arrangement was never offered or made known to other CLECs.[67]

(. . . continued)

[67] *See* Wilson Decl. ¶ 19-23.

In addition, Qwest and McLeodUSA, Inc. ("McLeod") entered into a secret deal interconnection agreement on April 25, 2000.[68] McLeod received several very favorable interconnection-related terms. First, the agreement allows McLeod to choose the lower of a low fixed price specified in the agreement or the price established by the 271 cost docket for subscriber list information. Second, the agreement allows McLeod to use a bill and keep arrangement for all interconnection traffic. Third, the agreement provides McLeod the broad and sweeping right to use interim prices for resale and UNE products in all 14 states through December 31, 2001 with the guarantee that final state dictated prices will only be used prospectively and not retroactively. Finally, the agreement allows for the extension of Centrex Service Agreements through December 31, 2002.[69]

In another secret deal agreement, Qwest gave Southwestern Bell Telephone ("SBCT")favorable interconnection terms that were not made available to other CLECs, including numerous terms and conditions for establishing rates for line sharing. And although this agreement states that these provisions will be offered to other carriers, no language was produced by Qwest for any state SGAT containing such terms. The SBCT secret agreement also grants SBCT a unique opt-in clause that requires Qwest to give SBCT any contract language that is given to any other CLEC as a result of settlement agreements in any Qwest state. Qwest has not offered a similar provision to other CLECs.[70]

On April 18, 2000, a group of CLECs entered into an agreement with Qwest titled "Confidential Stipulation Between Small CLECs and US West." In exchange for dropping their opposition to the Qwest/US West Merger, these CLECs received special treatment relating to an

[68] *See* Wilson Decl. ¶ 14.

[69] *See id*.

number of interconnection issues. For example, Qwest waived charges for T1 connectivity to Qwest computer centers in Denver or Omaha to access Qwest IMA and to receive billing and usage data. Other carriers still pay large substantial fees for such connectivity. In addition, the agreement allows these secret deal CLECs to adapt the terms of any effective interconnection agreements voluntarily negotiated and entered into by US West and any CLEC in any other state in US West's operating territory. Qwest actively has fought similar provisions in every state workshop and has not given such broad rights to other CLECs.[71]

Qwest will undoubtedly come up with excuses for these discrepancies, claiming that they were oversights, disputing that they are interconnection agreements, or contending that they have been terminated by other undisclosed agreements. Qwest might even claim that some of these agreements, although not posted on its website, have been filed with state commissions – a claim that would, of course, be impossible for the Commission to verify given that Qwest has filed the agreements under seal. This merely confirms, however, the impossibility of addressing Qwest's last-minute proposal and verifying Qwest's bare claim that it has filed all agreements in the final days of this proceeding.

Qwest's new filing standard is underinclusive. In all events, even if the Commission could somehow support a finding that Qwest has, in fact, filed all of the agreements that meet the new filing standard Qwest has announced, the application would still have to be denied for the simple reason that Qwest's proposed standard is vastly underinclusive and carefully crafted to miss many of Qwest's most troubling secret deals.

(. . . continued)

[70] *See* Wilson Decl. ¶ 15.

[71] *See* Wilson Decl. ¶ 16.

Qwest proposes strictly to limit its filings to written agreements that establish ongoing requirements under sections 251(b) or (c). That limitation is plainly crafted to shield some of the most important secret interconnection agreements from filing and availability to other carriers – namely agreements to provide substantial interconnection, network element and resold service discounts to favored carriers through sham side deals that, on their face, do not affect section 251 obligations, but, in fact, are the means for funnelling cash to the favored CLECs to supply the discounts. For example, when McLeod became concerned that Qwest would not honor its oral promise to give Qwest discounts of up to 10 percent off the prices stated in the parties' written secret interconnection agreement, Qwest simply created the legal obligation through a separate take-or-pay contract to purchase services *from* McLeod.[72] On its face, that contract did not purport to change the terms of the interconnection agreement, but the take-or-pay level was set at a high enough level such that Qwest would pay much more than the services it actually took from McLeod and thereby provide "kickbacks" sufficient to guarantee the interconnection agreement discounts.[73] Whether the sham side deals are themselves considered interconnection agreements – because they plainly affect the ongoing terms of interconnection – or it is the oral promises that led to the side deals that are the interconnection agreements, it should be clear that the nondiscrimination requirements demand that the *real* terms of the interconnection agreement, reflecting all discounts, and not just the undiscounted "list" prices reflected in the document that Qwest labels an interconnection agreement must be made available to other carriers. But Qwest's proposed standard would ensure that only the undiscounted prices that do not reflect the true terms of the secret deal are available to third parties. That is patently discriminatory.

[72] *See* Wilson Decl. ¶¶ 24-25.

[73] *See id.*

Qwest's August 20 proposal is replete with other equivocations and loopholes as well. For example, Qwest states that it does not intend to file "settlements of past disputes." That is the same ploy Qwest attempted to use to hoodwink state regulators. It has not worked there and the Commission should not fall for it here. As the Arizona staff recently held, a substantial number of the 28 agreements that staff demonstrated are interconnection agreements are ones that Qwest previously labeled as "billing settlement agreements."[74] As the staff specifically noted, "[i]n most cases, the agreements that were not filed were labeled as billing settlement agreements which as the name suggests, attempted to settle disputes with certain carriers, or, letter agreements which contained individualized business to business arrangements with the carrier involved." Once the staff reviewed the "billing settlement agreements" provided by CLECs, however, it has advised that no less than 15 of them were, in fact, interconnection agreements that changed ongoing section 251 obligations and that were required to be filed under Section 252.[75]

Qwest also proposes a "bankruptcy" exception. But the act provides no such exception based upon the context in which an interconnection agreement arose. And given the number of CLECs that have filed or are on the verge of bankruptcy, this limitation should be of particular concern. If Qwest's secret deals are interconnection agreements, it must file them and make them available to other carriers, regardless of whether those agreements are with bankrupt CLECs or solvent ones. There are a number of other suspect and entirely undefined caveats in

[74] *See Supplemental Staff Report and Recommendation*, Docket No. RT-00000F-02-0271, released August 14, 2002, at 4.

[75] *See id*. & Exhibit "G." The agreements identified in Arizona include a "Confidential Billing Settlement Agreement," a "Definitive Settlement Agreement letter," and a "Settlement Agreement" with Eschelon, a "Settlement Document" with McLeod, a "Confidential Billing Settlement Agreement and Release" with ELI, a "Confidential Billing Settlement Agreement" with XO (Nextlink), a "Confidential Billing Settlement Agreement" with Global C., a "Confidential Billing Dispute Settlement Agreement and Release" with Allegiance, and a "Confidential Billing Settlement Agreement" with WorldCom.

Qwest's proposal. Taken together, and in light of Qwest's known practices in this area, these limitations create gaping loopholes for continued secret deals discrimination that preclude any reasoned finding that Qwest has cured its secret deals discrimination and is presently providing nondiscriminatory access to iterconnection and UNEs.[76]

B. Qwest's Late-Filed Submission Cannot Cure The Impact Of The Secret Deals On The OSS Tests And The Record.

Regardless of the Commission's view of the impact of Qwest's eleventh hour proposal on the general checklist deficiency created by Qwest's secret deals discrimination, that new information cannot address *in any way* the other key deficiencies in the record that resulted from Qwest's past discrimination. Specifically, the present disclosure of all currently effective deals cannot possibly alleviate the damage done to the records developed in the states and in this proceeding both with respect to testing and workshop participation. Most obviously, belated filing of secret interconnection agreements cannot change the fact that KPMG relied upon performance data supplied by secret deal CLECs that were given special performance-impacting treatment. As a result, KPMG recognized that it could not claim that these test results are reflective of typical CLEC performance – the critical consideration in determining whether Qwest has met its burden of demonstrating OSS parity. In these circumstances, there is no rational basis for Commission reliance upon those test results as reflective of real world performance. Additionally, Qwest's practice of purchasing CLEC silence in exchange for

[76] Even if Qwest was to file all of the agreements that still are not available on its website or make public the agreements that it still has yet to file, and even if Qwest could remedy the other holes in its proposal, it is clear that not all of the terms of the secret deals that it plans to make public have been and will be made available to CLECs. Qwest claims that it will mark as available the terms that it decides will "relate" to section 251and thus be made available, and that it will redact other terms and conditions. In fact, a review of the agreements presently on its website confirms this very practice. As its past practices demonstrate, Qwest simply cannot be permitted to selectively decide which terms must be filed, made public and made available to CLECs.

impermissible past preferential treatment has deprived the state commissions and the FCC of critical factual input into the actual performance of Qwest.

OSS and Testing. KPMG has conceded that important findings and conclusions in its report on the third-party test were based, either in whole or in part, on information and data obtained from "secret deals" CLECs. As a result, and as KPMG recognized, there is no basis for a finding that those test results are a reliable indicator of the true performance of Qwest's OSS to the typical, non-secret-deals CLECs. As one example, when Qwest's initial UNE-P offering to CLECs broke down, Qwest provided Eschelon and McLeod a provisioning arrangement known as "UNE-Star," which is easier for Qwest to provision (since UNE-Star is essentially resold POTS service). Because Qwest's UNE-Star provisioning performance was lumped together with its UNE-P performance in the KPMG test, Qwest's UNE-P performance measures likely are overstated. An agency has a duty to "ascertain[] the accuracy of the data" on which it relies, for failure to do so constitutes "arbitrary agency action." *City of New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992). Obviously, use of all available data does not lead to accurate results if some of the data are inaccurate or unreliable. Thus, requirements of reasoned decisionmaking dictate that an agency exclude from consideration inaccurate, unreliable, and non-representative data. *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1995, 1201-1202 (D.C. Cir. 1996); *American Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 987 (D.C. Cir. 1987).

Obviously, Qwest's last-minute filing of the secret deals cannot undo any damage done to the tests conducted prior to that filing. In fact, the August 20 proposal, if anything, *exacerbates* the problem. In order for KPMG to unpack the data and remove data attributable to secret deals CLECs, it must know the identity of those CLECs. But Qwest proposes to disclose only currently effective agreements and acknowledges that some secret deals have recently

terminated. It is obviously critical that Qwest disclose all such deals that were in effect at any time during the past couple of years so that state commissions (and this Commission) can determine the full impact of those agreements on the OSS testing (and the performance record more generally). This is particularly true given the danger that Qwest may have engaged in gamesmanship in the months following revelation of its secret deals campaign to pay off CLECs with "non-interconnection" deals to induce them to cancel their secret interconnection deals (and thereby, under Qwest's proposal, to remove any need for the deals to be made available to other carriers). At a minimum, however, it is indisputable that Qwest's August 20 proposal does nothing to address the OSS testing problem.

Recognizing as much, Qwest now, for the first time in its Qwest II reply, denies that the secret deals impacted the results of the KPMG test.[77] As demonstrated below and in the declaration of Mr. Wilson,[78] these arguments do not withstand scrutiny, given Qwest's burden to produce reliable proof of the efficacy of its systems.

First, Qwest suggests that it is relying on commercial performance data (rather than the KPMG test) to establish that it is providing nondiscriminatory access to its OSS, and brands as "completely false" any suggestion that it "must rely almost exclusively" on the results of the KPMG test.[79] Despite its denials, Qwest itself has made plain that it is relying on the results of the KPMG test "[t]o support its commercial performance results, and to address those aspects of the OSS for which there are no assigned PIDs."[80] Indeed, Qwest has described the results of the KPMG test not simply as "supporting the conclusion" that it is providing nondiscriminatory

[77] *See* Qwest Reply Comments in *Qwest II* at 146-152 ("Qwest Reply").

[78] Wilsong Decl. ¶¶ 41-54.

[79] *Id*. at 146.

[80] *Qwest II* Application at 116.

access to its OSS, but as "*determinative of OSS-related issues*."[81] Of course, Qwest has little choice but to rely on the KPMG test because its commercial data are too limited to support a grant of its application. Even leaving aside the absence of meaningful commercial activity, Qwest's performance data do not support its claim that it is providing nondiscriminatory access to its OSS. In many instances, no commercial data exist to support Qwest's claim. Even the data that have been reported show that its performance for CLECs in many areas is worse than its performance for its retail operations. As to other measures, Qwest missed the benchmark standards that have been established. And even in areas where benchmarks have not been established, Qwest's performance has been poor by any standard. For example, Qwest's systems reject nearly one-third of CLEC orders, and more than 50 percent of non-rejected orders fall out for manual processing in some of the application states.[82]

Second, Qwest asserts that the two "CLEC Participation Studies" issued by KPMG show that the unfiled agreements had no effect on the validity of the test results.[83] KPMG, however, has acknowledged that in conducting these studies it neither reviewed any of the unfiled agreements nor investigated whether or not the information provided by any of the CLECs who were parties to these agreements was consistent with information held by other CLECs.[84] Consequently, it is hardly surprising that KPMG stated in its June 2002 study that it "is not *aware* of any evidence that suggests that Qwest has given preferential treatment to any of the participating CLECs in a manner that would undermine the credibility of the information relied

[81] *See id*.; Notarianni/Doherty *Qwest II* Decl. ¶ 33 (emphasis added).

[82] *See, e.g.* Finnegan *Qwest II* Decl. ¶¶ 130-193; Finnegan/Connolly/Menezes *Qwest II* Decl. ¶¶ 164-177.

[83] *See* Qwest Reply at 147-148.

[84] Finnegan/Connolly/Menezes *Qwest II* Decl. ¶ 17 & Att. 3 at 1.

upon by KPMG Consulting."[85] Although described by Qwest as "KPMG's most salient statement on point" (*id.*), KPMG's statement simply reflects the fact that it never conducted the type of investigation necessary to determine the true impact of Qwest's preferential treatment to the secret deal CLECs on the results of the test. KPMG, in fact, emphasized in both of these studies that it was making "no assertion as to whether or not the information received from the [secret deal] CLECs is representative of the 'typical' CLEC experience."[86]

Third, Qwest attempts to minimize the significance of KPMG's "CLEC Participation Studies," which found more than 40 different instances of test criteria where KPMG placed "substantial reliance" or "partial reliance" on input from "secret deal" CLECs, by asserting that KPMG "substantially relied" on such input in "only four" evaluation criteria.[87] As Qwest's own discussion makes clear, however, these criteria involved critical aspects of Qwest's provisioning performance – including its ability to meet, for *all* products, the applicable performance benchmarks for average installation intervals and installation commitments met, as well as its ability to adhere to documented methods and procedures and procedure tasks in the provisioning of ADSL line sharing circuits.[88] In the Wyoming testimony cited by Qwest, KPMG confirmed that the participation of the secret deal CLECs in these four criteria substantially affected KPMG's original finding that they had been satisfied:

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[85] Qwest Reply at 147 (quoting June 11, 2002, KPMG CLEC Participation Study) (emphasis added).

[86] Finnegan/Connolly/Menezes *Qwest II Decl*, 148-149 Att. 2 at 1 and Att. 3 at 1. Qwest's argument that KPMG's statement regarding the "typical" CLEC experience "has nothing to do with whether KPMG found that the agreements with these CLECs affected its findings in the ROC OSS test" borders on the frivolous. Qwest Reply at 147. The reliability of the test results depends on whether the data from the participating CLECs reflects "the typical CLEC experience." If Qwest accorded preferential treatment to these CLECs, their experience was clearly not "typical."

[87] Qwest Reply at 148.

[88] *Id.* at 148-149. *See, e.g., Michigan 271 Order* ¶ 168 (describing the average installation interval as "a critical measurement in determining whether nondiscriminatory access to . . . OSS functions has been provided to competing carriers"); *South Carolina 271 Order* ¶ 132 (describing installation intervals as "a critical measure of (continued . . .)

> For four of the evaluation criteria in the test, we labeled these as substantial reliance. And these were cases where we obtained data from one or more of the three CLECs, and it was the primary basis for our satisfied or not satisfied, or whatever the conclusion was, and that *if you took that data out, then it would force us to say unable [to determine] because we wouldn't have enough data to form an opinion.*[89]

Clearly recognizing the lack of merit in its position, Qwest rationalizes that three of the four evaluation criteria in the "substantial reliance" category pertain to whether the test orders met the benchmarks or parity standards under OP-3 (installation commitments met) or OP-4 (average installation intervals) – and that its reported commercial performance data show that it is meeting both metrics.[90] As AT&T has previously shown, however, Qwest's performance data for both OP-3 and OP-4 are unreliable. For example, Qwest's practice of rejecting CLEC UNE orders when facilities are not available (in contrast to its practice of simply holding retail orders indefinitely in such circumstances until facilities become available) – and excluding such rejected orders from the two metrics – results in an overstatement of its performance for CLECs under OP-3 and OP-4.[91] Furthermore, both KPMG and Liberty found that Qwest was frequently miscalculating the data for both OP-3 and OP-4, due to manual errors by Qwest personnel. Liberty never verified whether the problems that caused these errors had been corrected, and KPMG was unable to do so because of Qwest's refusal to permit retesting.[92]

(. . . continued)
parity").

[89] *See Qwest II* Application, Attachment 5, Appendix K, Wyoming Transcript, June 13, 2002, at 181 (emphasis added). KPMG's definition of "substantial reliance" thus refutes Qwest's assertion that it "belies logic" to believe that the unfiled agreements could have affected KPMG's evaluation of evaluation criteria such as 14-1-9, which involved whether the Qwest technicians provisioning ADSL line sharing circuits adhered to documented methods and procedure tasks. Qwest Reply at 149.

[90] Qwest Reply at 149.

[91] Finnegan *Qwest II* Decl. ¶¶ 119-124.

[92] *Id.* ¶¶ 54-66, 73-76, 89-93. Qwest also argues that KPMG's testimony in Wyoming regarding the numerous additional evaluation criteria where KPMG placed "partial reliance" on input from secret deal CLECs shows that such input was "irrelevant to KPMG's overall finding of compliance in the ROC OSS Test." Qwest Reply at 149-
(continued . . .)

Fourth, Qwest asserts that its commercial performance data show that the CLECs who entered into unfiled agreements with Qwest do not receive preferential treatment.[93] The data that Qwest provides, however, are insufficient to support any such conclusion. Qwest selectively offers data for only three of the CLECs (Covad, Eschelon, and McLeod) with which it made unfiled agreements – and not, for example, the other CLECs who were parties to such agreements and that KPMG purportedly considered in its June 11, 2002 "CLEC Participation Study."[94] More importantly, Qwest provides data for only *four* of its PIDs – flow-through rates for all "eligible" LSRs (PO-2B), the percentage of commitments met (OP-3), average installation intervals (OP-4), and overall trouble rates (MR-8).[95] Any demonstration of nondiscrimination, however, would involve an analysis of *all* of the PIDs for these three CLECs – not simply the four PIDs that Qwest has chosen to include in its analysis.[96] Qwest offers, for example, no explanation for its failure to include data for total flow-through (PO-2A), rejection rates (PO-4), repeat trouble report rates (OP-5), or new service installation quality (OP-5).[97]

(. . . continued)
150. KPMG, however, testified that "Partial reliance meant some of our record was based upon data or information interviews or something that we had with" these CLECs. *Id.* at 149 (quoting KPMG witness). Although KPMG witnesses asserted that KPMG's conclusions would not change even "if you took out all of that information provided by those CLECs" (*id.*), the witness provided no documents or other basis that would support this assertion (or from which the accuracy of this conclusion could be verified).

[93] *See* Qwest Reply at 150-151.

[94] *See* Finnegan/Connolly/Menezes Decl. , Att. 3 at 1 (listing some of the additional CLEC parties to unfiled agreements whose identities were brought to KPMG's attention after it issued its May 2002 CLEC Participation Report on the impact of input from Eschelon, Covad, and McLeod on the test results).

[95] *Id.* at 151.

[96] Qwest offers no basis for its assertion that the four metrics in question "are the key measures that, if AT&T's allegation had merit, would show better treatment for these CLECs." Qwest Reply at 151. Although the four metrics are *some* of the measures that are critical to determining whether Qwest is providing nondiscriminatory access to its OSS, they do not reflect the only instances in which discrimination can occur.

[97] Qwest's analysis is selective in other respects. For example, the data submitted by Qwest involve the period from January through June 2002. *Id.* Because the existence of the secret agreements was discovered no later than January 2002, the data that Qwest provides would be unlikely to reflect the full extent of the preferential treatment that Qwest provided under the agreements. Qwest would have had every reason to cease such treatment following disclosure of the agreements, since continuation of its conduct would have increased the likelihood of regulatory
(continued . . .)

Most fundamentally, the commercial data that Qwest provides does not show that the KPMG test results were not infected by preferential treatment that Qwest provided to the three CLECs. Although KPMG collected data for its test from participating CLECs during the fourth quarter of 2001 and the first quarter of 2002, Qwest's data include only the latter period. Thus, Qwest's data fail to cover the full period during which KPMG would have obtained data regarding Qwest's performance for these CLECs. That deficiency is particularly critical because it omits the time period prior to the public disclosure of the existence of the secret agreements – and thus the time period when Qwest would have been most likely to give preferential treatment. In short, Qwest's new arguments do not alter the fundamental deficiency in this record – just as KPMG was unable to do so, there is no reasoned basis for the Commission to conclude that the KPMG test results that relied upon secret deals CLEC data are representative of typical CLEC performance.

The Record In Total. Qwest's proposal to file interconnection agreements on a going forward basis likewise does nothing to address the serious issues raised by its offering of secret, discriminatory terms of interconnection in exchange for the silence of some of its most vocal critics. As is revealed in the Arizona staff's *Supplemental Report*, at least Eschelon, Mcleod, XO, and Z-Tel have been the subject of deals that procured, for some period or another, critical silence of the CLEC in Qwest's Section 271 proceedings with respect to facts that demonstrated problems with Qwest's performance in one manner or another. The record also reflects that SunWest and Allegiance may be parties to similar agreements. AT&T has identified in this

(. . . continued)
intervention and jeopardize the prospects of its request for Section 271 authority. Finally, although Qwest lists the number of months in which each of the three CLECs had "better," "worse," or "equivalent" data as to other CLECs (*id.*), it provides no basis for the ranges that it uses to define "equivalent" (and, thus, "better than" or "worse than"). AT&T only received the confidential exhibit that Qwest claims supports its assertions last night and thus has not yet had an opportunity to identify other flaws in Qwest's approach.

record specific harms caused by Qwest's procurement of silence. Unlike other agreements to refrain from participation in proceedings, the consideration for silence clearly now must be recognized as unlawful preferential treatment that violated Sections 251 and 252 of the Act -- sections that serve as the heart of Congress' effort to ensure that incumbents opened their local networks to competition.

Moreover, it is also clear that, unlike other agreements to refrain from participation in proceedings, Qwest's consideration purchased silence on critical factual matters, and not merely advocacy on policy matters. As demonstrated in detail in Mr. Wilson's declaration, Eschelon was one of the most vocal CLEC critics of Qwest's UNE-P performance, having had tremendous problems with Qwest's provisioning processes and with other aspects of market entry using Qwest UNE-P. Eschelon's procured departure from workshops crippled the factual presentations on UNE-P and severely damaged work on testing and metrics.[98] Similarly, McLeod was an important participant in some early section 271 workshops in states in Qwest's region, taking Qwest to task on the provisioning of poles, ducts, conduits and rights-of-way.[99] As the Arizona and Minnesota proceedings make crystal clear, the procurement of McLeod's silence damaged the section 271 process.[100] Finally, in Colorado's workshop process, Sun West had unique experiences with Qwest in provisioning UNE-Loop services, in collocation provisioning, in the availability of EEL, and with long-unresolved disconnected service, but ceased actively advocating the existence of problems after it entered into an arrangement with Qwest that was not filed or made public. With Sun West's procured silence, the problems with Qwest's

[98] Wilson Decl. ¶¶ 41-54. Unlike Eschelon, AT&T and others were not using UNE-P in the Qwest region because of the slowness of Qwest's work on OSS and the lack of Qwest testing capability.

[99] *See id*.

[100] *See, e.g.,* Arizona Supplemental Staff Report at 5.

provisioning of loops in rural areas were not resolved, and in AT&T's view, have yet to be resolved.[101]

To this very date, Qwest has attempted to ensure that the state processes do not contain the evidence of Qwest's problems with performance and its discriminatory practices. Qwest has gone out of its way to make clear that it will only file agreements that have not been terminated or superceded by later agreements, purportedly out of fear for "potential penalty liability" for "second-guessing" of its past transgressions. These past agreements, however, if compelled under Section 252(e) to be filed with the state commissions, cannot be concealed simply because they are no longer operative or have been terminated. The continued concealment of these agreements, which clearly were operative during the period in which Qwest's performance was evaluated by the states, prevents the CLECs, the states, and the Commission from assessing Qwest's actual performance in providing effective and nondiscriminatory interconnection to its network.[102]

C. The Public Interest Is Not Served By Rewarding Qwest's Conduct.

As the record reflects, Qwest's past practice of entering into arrangements for preferential terms and conditions of interconnection prevents any reasonable conclusion that the nondiscrimination requirements of the checklist can be met. Even if Qwest's last-minute proposal magically could erase the historic, and on-going, discriminatory practices inherent in the secret deals, the Commission would be faced head-on with the public interest concern

[101] Kenneth L. Wilson has provided further confirmation of these factual matters in his declaration.

[102] Moreover, allowing the continued concealment of terminated agreements provides Qwest with the incentive to buy out, terminate or otherwise cancel existing discriminatory provisions of interconnection agreements with the secret deal CLECs in the attempt to minimize the problem it now is experiencing with its Section 271 applications at the FCC and in certain states. Such a practice actually limits the number of advantageous terms that all CLECs could elect to pursue.

inherent in granting Qwest a reward for its past years of discriminatory practice and the myriad other unlawful and anticompetitive acts detailed in the comments in this proceeding.

Qwest clearly entered this proceeding on notice that conduct of its own volition in entering and failing to file these agreements raised an issue that, among others, states, KPMG, and the ROC Steering Committee all expected to be raised before the FCC and dealt with by the Commission. Moreover, Qwest's conduct with respect to the "secret deals" is not an isolated occurrence, but part of a mosaic that includes other adjudicated violations and allegations of serious misconduct that has taken place over the same period of time. As AT&T has detailed on several occasions, Qwest has a pattern of violating Sections 251, 252 and 271 of the Act. Within the last month, after vehemently denying that its pervasive "IRU" arrangements are services (as opposed to "asset sales"), Qwest has now admitted to the SEC that those arrangements are, in fact, services – and thus, as AT&T and others have demonstrated, that Qwest is presently violating Section 271. For all of these reasons, the Commission would be well served by honoring the commitment it made in its *Michigan 271 Order*: where a pattern of discriminatory or violative conduct is present, the Commission can recognize that serious doubt must be placed on an applicant's claim that its markets are open to competition and will remain open.[103]

[103] *See Michigan 271 Order* at ¶ 397.

CONCLUSION

For the foregoing reasons, and for the reasons set out in AT&T's initial and reply comments, Qwest's application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota should be denied.

Respectfully submitted,

/s/ Mark C. Rosenblum

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4263

David L. Lawson
Mark Schneider
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

Attorneys for AT&T Corp.

August 28, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2002, I caused true and correct copies of the forgoing Supplemental Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: August 28, 2002
Washington, D.C.

/s/ Peter Andros

Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Janice Myles
Wireline Competition Bureau
9300 East Hampton Drive
Capitol Heights, MD 20743

Qualex International
9300 East Hampton Drive
Capitol Heights, MD 20743

Meredyth Cohen
U.S. Department of Justice
Antitrust Division
Telecommunications and Media
Enforcement Section
1401 H Street, NW, Suite 8000
Washington, D.C. 20530

Bruce Smith
Colorado PUC
Logan Tower Office Level 2
1580 Logan Street
Denver, CO 80203

Jean Jewell
Idaho PUC
P.O. Box 83720
Boise, ID 83702

Penny Baker
Iowa Utilites board
350 Maple Street
Des Moines, IA 50319-0069

Chris Post
Nebraska Public Service Commission
301 Centennial Mall South
P.O. Box 94713
Lincoln, NE 68509-4713

Patrick J. Fahn
North Dakota PSC
State Capitol
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480

C.J. Tibbels
Hogan & Hartson
555 13th Street, NW
Washington, D.C. 20004

Debbie Goldman
George Kohl
Communications Workers of America
501 Third Street, NW
Washington, D.C. 20001

Jonathan D. Lee
Maureen Flood
The Competitive Telecommunications
Association
1900 M Street, NW #800
Washington, D.C. 20002

Megan Doberneck
Praveen Goyal
Jason D. Oxman
Covad Communications Company
600 14th Street, NW, Suite 750
Washington, D.C. 20005

Karen L. Clausen
Eschelon Telecom, Inc.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402-2456

Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman
3000 K Street, NW, Suite 300
Washington, D.C. 20007

New Edge Network
3000 Columbia House Boulevard
Suite 106
Vancouver, WA 98861

Brooks Harlow
Miller, Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352

Andrew D. Lipman
Patrick J. Donovan
Rogena Harris
Swidler Berlin Shereff Friedman
3000 K Street, NW, Suite 300
Washington, D.C. 20007

Marybeth M. Banks
H. Richard Juhnke
Sprint Communications Company LP
401 9th Street, NW, Suite 400
Washington D.C. 20004

Daniel M. Waggoner
R. Dale Dixon, Jr.
Julie Corsig
Davis Wright Tremaine LLP
1500 K Street, NW, Suite 450
Washington, D.C. 20005

Patrick J. Donovan
Kathernine A. Rolph
Harisha J. Bastiampillai
Swidler Berlin Shereff Friedman
3000 K Street, NW, Suite 300
Washington, D.C. 20007

Lisa B. Smith
Lori E. Wright
WorldCom, Inc.
1133 19th Street, NW
Washington, D.C. 20036